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\*ALSO ADMITTED IN  
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September 13, 1993

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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.c. 20554

RE: Ex Parte Presentation in MM Docket 92-266

Dear Mr. Caton:

Pursuant to 47 CFR § 1.1206(1), the undersigned submits this original and one copy of a letter disclosing a written ex parte presentation.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

*John W. Pestle*  
John W. Pestle

JWP/kel

cc: Ms. Amy Zoslov  
Chron file

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September 13, 1993

Ms. Amy J. Zoslov  
Attorney  
Federal Communications Commission  
2025 M Street, N.W.  
Suite 8210  
Washington, D.C. 20554

RE: Ex Parte Presentation in MM Docket 92-266

Dear Ms. Zoslov:

Thank you for taking time to meet with me last Thursday. Your comments were helpful to me and I hope mine were to you as well.

I have attached a copy of a letter that I sent to Mr. Corn-Revere and Mr. Hollar on the proprietary information issue. On Booth-American et al's request that the proprietary provision be narrowed such that franchising authorities would be able to get proprietary information for something less than that which is necessary "to make a rate determination" I would respond as follows: Booth-American quotes language from the Commission's order that the right to additional information arises only where rates exceed the Commission's presumptively reasonable level. However, in many instances franchising authorities need proprietary information to be able to determine what the "presumptively reasonable" level is.

For example, with a number of cable companies the number of subscribers is in dispute between the franchising authority and the cable company. Currently, this predominates around such issues as the 30% penetration rate for effective competition and whether or not a cable operator has more than 1,000 subscribers so as to be above the Commission's temporary stay of rate regulation. However, it is obvious that similar issues will arise given that the allowable per channel charge varies with the number of subscribers on the system.

Franchising authorities will thus need access to cable company data related to the number of subscribers which may include not only actual subscriber counts but reports that they give to varying entities where the cable operators may have incentives to inflate, deflate or be accurate on the number of subscribers depending upon the circumstances. Key issues here will relate to data on a bulk accounts, multiple unit dwellings and the like. We also expect that there will be

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some issues on what is a channel particularly where the number of channels is claimed to vary from community to community where channels are shared by different program providers and the like.

Obviously the franchising authority needs very complete data related to equipment costs. Booth-American appears to concede this so I will not belabor the point.

In the future, the franchising authority will need complete data on external costs, including such matters as external costs that are below the rate of inflation, claimed franchise requirements and other claimed external costs pass-throughs and the like.

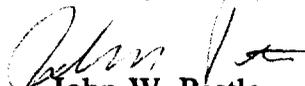
In general, I would simply note the chicken and egg problem that without having access to adequate data, franchising authorities are not in a good position to determine whether or not rates exceed the "presumptively reasonable" level. Given that the franchising authority has to abide by the FCC's proprietary information rules, there should be no need to discourage them from getting data sufficient to make sure that the cable companies rates actually comply with the FCC rules. Any such limitation would be contrary to the public interest, given the strong incentive on the part of cable companies to stretch (if not break) the FCC's rules and the fact that they have all the information at their disposal which would tend to show compliance, non-compliance or the like.

We appreciate your considering these views. If I can be of any assistance, please let me know.

With best wishes,

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

  
John W. Pestle

JWP/kel

cc: Chron file

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September 13, 1993

Mr. Robert Corn-Revere  
Legal Advisor  
Offices of Chairman James Quello  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Mr. John Hollar  
Assistant  
Offices of Commissioner Duggan  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

RE: Ex Parte Presentation in MM Docket 92-266

Gentlemen:

Just a note to thank you for taking time to meet with me last Thursday. Your comments were most helpful and on behalf of the 200 communities we represent we thank you.

To reiterate one of the points we discussed, it is essential that the FCC rule itself (rule Section 76.938 on proprietary information) expressly state that all state statutes and rules to the contrary are preempted. Unless this is stated in the rule itself, preemption arguments unfortunately are likely to be given short shrift by state court judges who have to rule on state Freedom of Information Act requests. A clear statement in the rule that such state laws are preempted will likely prevent (or at minimum allow the easy resolution of) any such suits. Without such express preemption, municipalities are more likely to either not regulate at all or claim inadequate resources/lack of legal authority so as to try to force the FCC to regulate.

As best I can tell, there is no disagreement between the cable operators and franchising authorities on this point -- all agree that the Commission's proprietary information requirements

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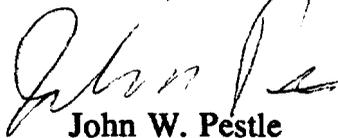
should preempt any state laws to the contrary. However, as a practical matter, for this to be effective and minimize the burden on the FCC and franchising authorities, such preemption has to be stated in the rule itself, not just in the accompanying text.

Thanks again for taking the time to meet.

With best wishes,

Very truly yours,

**VARNUM, RIDDERING, SCHMIDT & HOWLETT**



**John W. Pestle**

JWP/kel

cc: Chron file